NETWORK PET PRODUCTS (M) SDN BHD A

v.

ROYAL CANIN SAS & ANOR

HIGH COURT MALAYA, KUALA LUMPUR B
HASNAH MOHAMMED HASHIM J
[SUIT NO: 22NCC-1038-7-2012]
8 OCTOBER 2012

CIVIL PROCEDURE: *Injunction - Ex parte injunction - Setting aside - Application for - Contract to market pet food products in Malaysia - Notice of non-renewal of contract - Allegation of loss and damages - Delay in filing injunction application - Whether plaintiff acted with promptitude - Whether balance of convenience in favour of defendant - Whether irreparable harm or damage would be caused - Whether injunction ought to be granted - Rules of the High Court 1980, O. 29 r. 1* C D

The plaintiff and the first defendant were companies incorporated in Malaysia and France respectively and were both in the business of trading and/or manufacturing pet products. On or around the year 1996, the plaintiff entered into an oral agreement with the first defendant to supply pet food products which bore the "Royal Canin" trademark ("the products"). The first defendant appointed the plaintiff as its sole distributor of the products. The parties continued with the business relationship as per the contract until December 2007 and thereafter, the contract was renewed on a yearly basis by the conduct of the parties until 21 October 2011. *Vide* a letter dated 21 October 2011, the first defendant informed the plaintiff that it was not going to renew the contract for another term and gave the plaintiff nine months' notice which would expire on 31 July 2012. It was the plaintiff's contention that the first defendant had agreed to continue with the business relationship where the plaintiff would be the sole and exclusive distributer of the products in Malaysia and Brunei. Sometime in 2011, the first defendant had set up a representative office in Malaysia and the second defendant was established on 17 May 2012. The plaintiff disputed the first defendant's entitlement to terminate the contract. Further, by incorporating the second defendant, it was the plaintiff's contention that the first defendant had the intention to enter the Malaysian market to be the distributer of the products. As a result of the first defendant's E F G H I

A action, the plaintiff alleged that it had not only lost the benefit of the partnership but also the profits derived from the sale of the products. An *ex parte* injunction application was filed against the defendants and it was allowed by the court. The defendants then filed for an application pursuant to, *inter alia*, O. 29 r. 1 of the
B Rules of the High Court 1980 for the following orders, *ie*, (i) that the *ex parte* injunction order be set aside; and (ii) an order for damages.

Held (allowing defendants' application with costs):

C **(1)** The notice of intention not to renew the contract was issued by the defendant in October 2011 and the plaintiff had filed the injunction application on 12 July 2012. Clearly, the plaintiff was aware of the defendant's intention from October 2011. Thus, the plaintiff should have initiated and applied for
D an injunction immediately upon the receipt of the notice of non-renewal. Further, the fact that the plaintiff decided to wait and only file the claim on 3 July 2012 as well as the summons in chambers on 12 July 2012 clearly showed that the plaintiff had not acted with promptitude. (paras 11, 12 & 14)

E **(2)** The circumstances showed that the balance of convenience was in the defendant's favour. On the balance of convenience, an injunction ought not to be granted to restrain the first defendant from distributing its own products which had its
F own trademark name. The plaintiff also failed to show that irreparable harm or damage would be caused to them and that such harm or damage would place them in an irretrievable position which was incapable of remedy by way of damages. (para 15)

G *[Action to be set down for trial].*

Case(s) referred to:
Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors [1995] 1 CLJ 461 SC ***(refd)***

H **Legislation referred to:**
Rules of the High Court 1980, O. 3 r. 5, O. 32 r. 6, O. 29 r. 1

For the plaintiff/appellant - M Nagarajah (Tanya Marie Lopez & Ida Daniella Zulkifli with him); M/s Shook Lin & Bok
I *For the defendant/respondent - Jack Yow; M/s Rahmat Lim & Partners*

Reported by Kumitha Abd Majid

JUDGMENT

Hasnah Mohammed Hashim J:

[1] Enclosure 22 is the defendants' application pursuant to O. 29 r. 1, O. 32 r. 6, O. 3 r. 5 of the Rules of the High Court 1980 for the following orders:

(a) That the *ex parte* injunction order granted on 19 July 2012 be set aside;

(b) An order for damages.

[2] The plaintiff is a company incorporated in Malaysia carrying on the business of trading and/or manufacturing of pet products. The defendant is a company incorporated in France carrying on the business of trading in and/or manufacturing of pet products.

[3] On or around the year 1996 the plaintiff entered into an oral agreement with the first defendant to supply pet food products bearing the 'Royal Canin' trademark ('the products'). The plaintiff started selling pet accessories as well as the products. On 15 May 2003 the 1st defendant entered into a written contract of distributorship with the plaintiff to formalise the existing arrangement with the plaintiff. The first defendant appointed the plaintiff as its sole distributor of the products. Article 1 of the said contract provides that the plaintiff:

> ... sells in its own name in its account. It has a status of an independent dealer *vis-a-vis* ROYAL CANIN SA and *vis-à-vis* its customers. It will be held to promote sales of the ROYAL CANIN products ... without being authorized to act in the name or on behalf of ROYAL CANIN.

[4] The said contract was for a period of two years commencing form 1 January 2003 and ending on 31 December 2004.

[5] Based on the terms of the contract the plaintiff forwarded annual business plans to the first defendant for vetting and approval. Article XVII of the contract stipulates that the contract may be renewed for consecutive periods of one year subject to the approval of the first defendant and also an agreement of the minimum sales target for the year. When the contract term expired on 31 December 2004 the parties continued with relationship without executing any renewal agreement. The parties continued

with the business relationship as per the contract until December 2007. After December 2007 there were no business plans issued by the plaintiff for the first defendant's vetting and approval. The contract was renewed on a yearly basis by the conduct of the parties until 21 October 2011.

[6] It is the contention of the plaintiff that the first defendant had agreed to continue with the business relationship where the plaintiff will be the sole and exclusive distributor of the products in Malaysia and Brunei. The plaintiff has been the sole distributor of the products in Malaysia and Brunei since the year 1996. Over the course of the years the plaintiff has established its business as the sole and exclusive distributor of the products. Sometime in 2011 the first defendant set up a representative office in Malaysia. The second defendant was established on 17 May 2012.

[7] By a letter dated 21 October 2011 the first defendant informed the plaintiff that it was not going to renew the contract for another term and gave the plaintiff nine months notice which would expire on 31 July 2012. The plaintiff disputes the first defendant's entitlement to terminate the contract. It is the contention of the plaintiff that the first defendant's action incorporating the second defendant is an indication of the 1st defendant's intention to enter the Malaysian market to be the distributor of the products.

[8] As a result of the first defendant's action, the plaintiff has not only lost the benefit of the partnership but also the profits derived from the sale of the products.

[9] After hearing the submissions of the plaintiff the *ex parte* application in particular (i), (ii), (iii), (vi), (v), (vi)(as amended), (ix), (x) and (xii) was allowed on 19 July 2012 with the usual undertaking for damages. The *inter partes* application was fixed on 7 August 2012.

[10] The application to set aside encl. 22 was heard on 31 July 2012 and after hearing the submissions of both parties I allowed the application to set aside the *ex parte* injunction and order in terms was granted.

[11] My reasons allowing the setting aside of the *ex parte* injunction are as follows:

> The notice of intention not to renew was issued by the defendant to the plaintiff in October 2011. The injunction application was filed by the plaintiff on 12 July 2012. No explanation was given as to the delay in filing the application except that it was only on 28 May 2012 that the plaintiff discovered that the second defendant was incorporated and the products were distributed in May 2012. It was only on or around June 2012 that the plaintiff realised that there was a high probability that the defendants would begin distributing the products.

[12] However as stated above the notice of non renewal of the contract was issued in October 2011. Clearly the plaintiff was aware from October 2011 of the intention of the defendants. The notice in actual fact gave the plaintiff nine months which expired on 31 July 2012 to distribute and sell the any balance supply of the products. The plaintiff should have initiated and applied for an injunction immediately upon the receipt of notice of the non renewal.

[13] The Supreme Court in *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors* [1995] 1 CLJ 461 held:

> As with all equitable reliefs delay is a relevant factor in interlocutory proceedings for injunctive relief. An important maxim in regard to delay is that equity aids the vigilant, and not those who sleep on their rights; "*vigilantibus non dormientibus jura subvenient*". The essence of an application for interlocutory injunction is that it should be made with promptitude. It is said that the Court will not grant an interlocutory injunction if the plaintiff having sufficient notice of the defendant's intention to commit the act sought to be restrained is guilty of unreasonable delay in applying to the Court. The illustration of this principle is to be found in the case of *Salisbury v. The Metropolitan Railway Company* [1870] 39 LJR Equity Ch 429. The cases of *Hj. Wan Habib Syed Mahmud and Chung Khiaw Bank Ltd.* cited above are Malaysian authorities on the same point. It must be pointed out, however, that not all delay is bad delay or, to be precise, inexcusable, as it may be explained or inevitable.

Salmon LJ in *Allen v. Sir Alfred McAlpine & Sons Ltd.* [1968] 2 QB 229 set out at page 268 three factors which are relevant in considering whether delay should be allowed as a ground to refuse an interlocutory injunction. These factors are at page 268. Salmon LJ said:

> ... In order for such an application to succeed, the defendant must show:
>
> (1) that there has been inordinate delay. It would be highly undesirable and indeed impossible to attempt to lay down a tariff - so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend upon the facts of each particular case.
>
> These vary infinitely from case to case, but inordinate delay should not be too difficult to recognise when it occurs.
>
> (2) that this inordinate delay is inexcusable.
>
> As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusble.
>
> (3) that the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of the issue between themselves and the plaintiff, or between each other, or between themselves and the third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial.

It must also be emphasised here what is important to consider is not so much the length of the delay but whether the delay has in some ways made it unjust to grant the injunction claimed. Megarry J's observation in the case of *Legg v. I.L.E.A.* [1972] 1 WLR 1245 appearing at pages 1259-60 is apposite:

> I have hesitated somewhat on this point. What seems to be important is not so much the length of the delay *per se*, but whether the delay has in some ways made it unjust to grant the injunction claimed. An injunction granted now would be more burdensome to the I.L.E.A. and to the parents and boys affected by it than an injunction granted two months ago.

Nevertheless I am not persuaded that the added burden is of sufficient weight to bar the remedy ...

[14] In the instant case despite the notice of non renewal issued on 21 October 2011 which would expire on 12 July 2012 the plaintiff decided to wait and only filed the writ and the statement of claim on 3 July 2012 as well as the summons in chambers on 12 July 2012. This clearly show that the plaintiff had clearly not acted with promptitude.

[15] The circumstances show that the balance of convenience is in the defendant's favour. On the balance of convenience, an injunction ought not to be granted to restrain the defendant from distributing its own products which is in the defendant's trademark name. The plaintiff also have failed to show that irreparable harm or damage would be caused to them and that such harm or damage would place them in an irretrievable position incapable of remedy by way of damages.

[16] For all of the above reasons I allow the defendant's application in encl. 22 with costs and direct that the trial of this action be set down for trial as soon possible.